

CANADA / JUDGMENT

Li v. Sandhu

2006 BCSC 949

COURT

Supreme Court of British Columbia

DECIDED

21 June 2006

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2006BCSC0949

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Sandhu,

2006 BCSC 949

Date: 20060621

Docket: M002449

Registry: Vancouver

Between:

Li Ting Li, by her litigation guardian,

the Public Guardian and Trustee of British Columbia

Plaintiffs

And

Aman Paul Sandhu and Charanjit Kaur Sandhu

Defendants

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment (Damages)

Counsel for the Plaintiffs

E. A. Thomas

R. C. Marcoux

Counsel for the Defendants

W. N. Fritz

Date and Place of Trial/Hearing:

April 18, May 12, June 15, 16, 2006

Vancouver, B.C.

Introduction

[1] On March 28, 2006, the jury delivered their verdict in this personal injury action. They found the defendant to be 100% at fault for the motor-vehicle accident and awarded damages to the plaintiff in the following amounts:

- Non-pecuniary damages \$600,000;
- Past loss of Income \$110,000;
- Future loss of income \$375,000;
- Cost of Future Care \$1,610,000.

[2] By agreement of counsel, certain issues were reserved to be decided after the jury's verdict. These include the amount by which the award for past loss of income must be reduced to produce a net, after-tax award; the cost of management fees; and the gross-up of the award for the cost of future care to account for the effect of taxation. The jury was specifically instructed that they did not have to consider these issues, as they would be dealt with by me after they rendered their verdict.

[3] One additional issue must be dealt with on the motion for judgment, and that is the effect of the "cap" on non-pecuniary damages imposed by law by the Supreme Court of Canada in the 1978 trilogy of *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Arnold v. Teno*, [1978] 2 S.C.R. 287; and *Thornton v. Board of School Trustees of School District No. 57* (Prince George), [1978] 2 S.C.R. 267.

Non-Pecuniary Damages

[4] In the 1978 trilogy, the Supreme Court of Canada imposed a rough upper limit of \$100,000 for awards of non-pecuniary damages in cases of catastrophic personal injury. More recent cases from our Court of Appeal have discussed the rationale for the so-called "cap", especially in light of the fact that s. 6 of the Negligence Act, R.S.B.C. 1996, c. 333 provides that the amount of damages to be awarded in an action is a question of fact: see, for example, *Dilello v. Montgomery*, 2005 BCCA 56, and *Lee v. Dawson*, 2006 BCCA 159.

[5] In the present case, the jury was not given any instruction on the upper limit for non-pecuniary damage awards. Their verdict under this head of damages was for \$600,000. In light of the fact that the Supreme Court of Canada may yet re-visit this issue, counsel for the plaintiff does not concede that the jury's award must be reduced, but he does acknowledge that the current state of the law in this Province leaves me with little choice to do otherwise. Both counsel agree that the current level of the cap, adjusted for inflation to the time of the trial, is \$309,300. Counsel for the defendant does not suggest that the judgment for non-pecuniary damages should be below this amount.

[6] In *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, Sopinka J. said at para. 114:

Whether the jury is or is not advised of the upper limit, if the award exceeds the limit, the trial judge should reduce the award to conform with the "cap" set out in the trilogy and adjusted for inflation. While a trial judge does not sit in appeal of a jury award, the trilogy has imposed as a rule of law a legal limit to non-pecuniary damages in these cases. It would be wrong for the trial judge to enter judgment for an amount that as a matter of law is excessive.

[7] Accordingly, the judgment in this case for non-pecuniary damages shall be set at \$309,300.

Past Income Loss

[8] Section 54 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 provides:

54. Despite any other enactment or rule of law but subject to this Part, a person who suffers a loss of income as a result of an accident or, if deceased, his or her personal representative, is entitled to recover from designated defendants, as damages for the income loss suffered after the accident and before the first day of trial of any action brought in relation to it, not more than the net income loss that the person suffered in that period as a result of the accident.

[9] In this case, the jury awarded \$110,000 for past loss of income. They were instructed not to consider the amount the plaintiff would have had to pay in income taxes, as I would make that adjustment after they had reached their verdict.

[10] Based on the jury's verdict, the plaintiff calculates that the amount to be deducted for tax is \$32,667, while the defendant submits the slightly higher amount of \$32,741. Accepting the plaintiff's figure, the net income loss for the purpose of s. 54 is \$77,333.

[11] Both counsel agree that the plaintiff has already received \$30,817 in temporary disability benefits from the Insurance Corporation of British Columbia, which must be deducted to arrive at the actual amount still payable, or \$46,516. Pre-judgment interest is to be calculated on that amount. The parties are in agreement that the amount of pre-judgment interest is \$3,875.

Committee and Management Fees

- [12] The Public Guardian and Trustee became the plaintiff's litigation guardian on December 16, 2005, and a committee order was made a few months later on March 3, 2006, just prior to the start of trial. As the committee order resulted from the injuries caused by the accident, the plaintiff submits that she is entitled to an award to cover the fees charged by the Public Guardian and Trustee: *Semenoff (Committee) v. Kokan*, (1991) 59 B.C.L.R. (2d) 195 (C.A.).
- [13] Mindy Dillon, the plaintiff's case manager, gave evidence about the amounts charged by the Public Guardian and Trustee. She said there is a one-time fee of 5% of the capital, plus an annual fee of 0.4% of the assets under management, plus 5% of income. Those fees are prescribed by regulation and are not negotiable: *Public Guardian and Trustee Fees Regulation*, B.C. Reg. 312/2000. The defendant does not dispute that the plaintiff is entitled to an award for the amount of those fees.
- [14] At issue, however, is whether, in addition to the fees of the Public Guardian and Trustee, the plaintiff is also entitled to an award to cover fees for external investment management. The plaintiff submits that such management is necessary and the cost should be born by the defendant. The defendant submits that the necessary management can be accomplished by the Public Guardian and Trustee without the expense of an outside manager.
- [15] In *Mandzuk v. I.C.B.C.*, [1988] 2 S.C.R. 650, the Supreme Court of Canada held that management or investment counselling fees may be awarded in serious personal injury cases, but only if there is factual basis for doing so. There must be evidence both that the management assistance and investment advice is necessary, and also evidence as to the cost of such services.
- [16] Whether these services are necessary is a question of fact in each case. An award will only be made if the circumstances of the plaintiff require it. The circumstance that the court referred to in *Mandzuk* was whether the plaintiff, either by reason of the injuries complained of or by natural state, was incapable of managing the investment of his award without such professional help. Speaking for the court, Sopinka J. said at p. 651:
- [A]n investment counselling fee should be awarded if the plaintiff's level of intelligence is such that he is either unable to manage his affairs or lacks the acumen to invest funds awarded for future care so as to produce the requisite rate of return.
- [17] I take Sopinka J.'s reference to the "requisite rate of return" to mean the rate of return used by the jury in arriving at the net present value of the sum found to be appropriate for the future care award. In this Province, that rate is set by law at 3.5%: *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 56; *Law and Equity Act Regulation*, B.C. Reg. 352/81. That is the real rate of return which the plaintiff's investments must achieve in order to produce the future income stream that the jury considered necessary to meet her future care needs.

- [18] Ann Harkness, the manager of investments for the Public Guardian and Trustee testified for the plaintiff on this issue. She said that her role is to ensure the prudent investment of all of the plaintiff's assets. She and her staff set the investment strategy and then monitor it. Generally, where a patient's assets are under \$500,000 they use some combination of three internal pooled funds, similar to mutual funds, that are managed by the B.C. Investment Management Corporation, formerly, the Provincial Treasury of B.C. The three funds are a money market fund, a balanced income fund, and a balanced growth fund. The nominal rate of return for those funds for the year ending March 31, 2005 was 3.69%, 6.80%, and 6.60% respectively. For the year ending March 31, 2006, the nominal rates of return were 3.82%, 11.45%, and 14.58%. She said the current rate of inflation is about 2 to 2.5%, so that amount must be deducted from the nominal rates to obtain the real rates of return.
- [19] Ms. Harkness testified that where a patient has over \$500,000 to be invested and also has a need for large cash flows, she would typically employ the services of an external fund manager rather than using the pooled funds available through the B.C. Investment Management Corporation. The use of such an external fund manager attracts additional fees. The Public Guardian and Trustee pays external managers 0.5% per annum on the assets under management, in addition to 0.25% custodian charges. She said that this is what she envisaged for the management of the plaintiff's investments.
- [20] The plaintiff submits that since the Public Guardian and Trustee has said that it will employ outside management for the plaintiff's funds, the plaintiff should receive an award to cover that 0.75% investment management cost, in addition to her award for the fees of the Public Guardian and Trustee.
- [21] As noted by Sopinka J. in *Mandzuk*, the issue of whether the plaintiff should receive an award for external investment management fees is essentially a question of fact. Does the evidence establish on a balance of probabilities that the engagement of an external investment manager is necessary to achieve the "requisite rate of return"?
- [22] This question cannot be answered simply by looking at the rates of return achieved by the pooled funds available through the B.C. Investment Management Corporation for the past two years, since there is no way of knowing whether those rates of return will be achieved in the future: *Townsend v. Kroppmanns*, [2004] 1 S.C.R. 315.
- [23] Rather, the question is whether this plaintiff, by virtue of her particular circumstances, requires the services of an external investment manager. In my view, the evidence falls short of establishing that she does. If there were no committee order, she would undoubtedly be incapable of managing her investments without professional assistance. But in this case, she already has the assistance of the Public Guardian and Trustee. The Supreme Court of Canada's decision in *Mandzuk* clearly contemplates that not all plaintiffs in serious personal injury cases will receive an award for investment management fees; it depends on whether they require it, based on their individual circumstances. In the present case the evidence does not establish that the plaintiff, with the assistance she will receive from the

Public Guardian and Trustee, cannot achieve the "requisite rate of return" without the assistance of an external investment manager. The fact that the Public Guardian and Trustee has decided to hire such a manager does not demonstrate that doing so is necessary to produce the "requisite rate of return." Rather, the Public Guardian and Trustee may envision that with the help of an external money manager, the plaintiff can achieve a return in excess of the "requisite rate" and that the additional expense of 0.75 % is therefore worthwhile. But while the decision to hire an external manager may therefore be prudent and in the plaintiff's best interests, this does not mean that it is necessary to produce the "requisite rate" as described by Sopinka J. in *Mandzuk*.

[24] In short, the plaintiff has not met the onus on her of proving the necessity of external money management in addition to the services of the Public Guardian and Trustee. Therefore, while she is entitled to an award to cover the Public Guardian and Trustee's fees, she is not entitled to an additional award for external financial management expenses.

[25] The next issue is whether the award for the fees of the Public Guardian and Trustee should be grossed-up for tax. The plaintiff says it should, as it is an ongoing expense which the plaintiff must be pay out of a future income stream. The defendant maintains that the fees must not be grossed-up. He relies on *Cherry (Guardian ad Litem of) v. Borsman* (1992), 94 D.L.R. (4th) 487 (B.C.C.A.), where the court said at pp. 513-514:

In addition to the income the infant plaintiff will have from the award for future care costs, she has the income from the awards for non-pecuniary damages (\$160,000), loss of future income (\$395,000) and management fees (\$225,500). The defendant is not obliged to protect those awards against the incidents of income tax: see *Scarff v. Wilson* (1990), 66 D.L.R. (4th) 52, at p. 65 (S.C.B.C.).

[Emphasis Added.]

[26] I agree with the defendant that this issue has been decided by our Court of Appeal, and management fees are not subject to gross-up for tax.

Gross-up For Tax

[27] The principles applicable to tax gross-up for future care awards were conveniently summarized by Finch J. in *Tucker (Public Trustee Office) v. Asleson* (1992) 62 B.C.L.R. (2d) 78 (C.A.) at pp. 87-88:

1. Where the evidence supports such an award, an allowance should be made to compensate a plaintiff for the income tax payable on income earned by an award for the cost of future care.
2. Damages, including allowances for tax gross-up, are to be "assessed" and not "calculated".
3. The tax structure at the time of the award is a useable model for calculating future income tax payable.

4. Income earned from other awards (apart from the cost of future care) is a reality affecting tax rates which must be taken into account in calculating the tax gross-up on the award for cost of future care.
 5. No tax gross-up is allowable for the tax payable on the income earned by other awards such as future loss of earnings, non-pecuniary damages etc.
 6. Gross-up for the income tax payable on income earned by the award for the cost of future care should be calculated after all other income has been subjected to tax. In other words, income earned from the various pools is to be "stacked" as opposed to being "co-mingled" with income from other investment pools. This is the proper approach even though it results in a higher allowance for income tax gross-up than does "co-mingling" of all income and the calculation of overall tax rate.
- [28] Both the plaintiff and the defendant called expert evidence on how the award for the cost of future care should be adjusted or grossed-up to account for the fact that income on the award will be subject to income tax. The purpose of the gross-up is to ensure that the award is large enough to provide the future income stream that the jury considered necessary for the plaintiff's care. If there were no gross-up, the effect of taxation would result in the fund being exhausted earlier than the jury intended.
- [29] While the purpose of the gross-up is something about which economists can agree, the proper method for its calculation is a matter of some controversy.
- [30] Robert Carson, of Associated Economic Consultants Ltd., gave evidence for the plaintiff. He based his calculations on the survival probability method. Mark Szekely, an economist with Columbia Pacific Consulting, gave evidence for the defence, and he used a method based on the plaintiff's life expectancy, although he disagreed with Mr. Carson's characterization of his approach as being a "life certain" calculation.
- [31] The debate as to which approach is more appropriate for calculating tax gross-up of future care awards is one of long-standing among economists. It was one of the topics considered by the Law Reform Commission of British Columbia in their 1994 Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages. The committee that worked on that project, including Robert Carson and another economist from Associated Economic Consultants, favoured the survival probability approach. That report, however, was never implemented through legislation, nor has there been a definitive judicial pronouncement adopting its recommendations.
- [32] On the contrary, the only two cases cited to me from this Province which have considered the issue both accepted the method of calculation used by Mr. Szekely's firm over that used by Mr. Carson's firm.
- [33] The life-certain approach was endorsed by Williamson J. in *Sammartino (Guardian at Litem of) v. Hiebert*, [1996] B.C.J. No. 2650 (S.C.). At para. 17 he wrote:

Finally, the parties disagree on the appropriate calculation of life span. Mr. Carson, for the plaintiff, has used the "probability life expectancy" method, Mr. Hildebrand the "life certain" method. Mr. Carson's only reason for preferring his method is that it is consistent with his other calculations. Mr. Hildebrand says his method is regularly used in such calculations, and manifests a more conservative approach. I note Mr. Hildebrand testified that where a young person is involved, the end result is not very different. Mr. Carson seemed to echo this. I conclude the method used by Mr. Hildebrand should be used.

[34] Similarly, in *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2002 BCSC 862, Wong J., after referring to the evidence before him based on both the probabilistic approach and the life certain approach, concluded at para. 14:

As the life-certain method considers the actual annual amounts required to be withdrawn for care, I think it makes more logical sense and I would adopt that approach.

[35] There is an additional point of difference between the calculations of Mr. Carson and those of Mr. Szekely. As noted by Finch J. in *Tucker (Public Trustee Office) v. Asleson*, other sources of income are to be "stacked" before calculating the tax gross-up. Both experts accept this principle, but differ as to what should be included as "first dollar" income in the stack. Mr. Carson includes the plaintiff's Canada Pension Plan disability benefits and also includes the disability tax credit. Mr. Szekely's view is that inclusion of those amounts is not appropriate. The 1994 Law Reform Commission Report considered this issue and noted that the jurisprudence is unsettled on whether so-called "collateral benefits" should be included in "first dollar" income.

[36] The defendant submits that Mr. Carson's approach exaggerates the tax gross-up and committee fees. I agree. In his report of April 13, 2006, Mr. Szekely wrote:

Mr. Carson's income tax estimates take into account the Plaintiff's entitlement to CPP Disability Benefits. Mr. Carson's approach would only be valid if these disability benefits were also being subtracted from the overall award. In most litigation matters, we understand that CPP Disability Benefits are treated as a non-deductible "collateral" benefit. If so, a consistent analysis of income tax gross-up must disregard these benefits as well. Eliminating CPP Disability Benefits reduces Mr. Carson's \$129,500 result by about 20.0%.

We understand that Mr. Carson's approach assumes that survival-adjusted withdrawals will be made in each year, and that withdrawals and taxes will persist with certainty until well beyond the Plaintiff's actual life expectancy. Mr. Carson's approach overstates the expected taxes over Ms. Li's lifetime.

A preferable approach is to calculate the annual withdrawal amounts before adjusting for the Plaintiff's survival. Survival would still apply, but only after calculating taxes for each year. This decreases Mr. Carson's \$129,500 result by about 6.5%.

Mr. Carson's analysis (and our own analysis) recognizes that the Plaintiff qualifies for the Disability Tax Credit (or DTC). Recognizing that one-to-one rehabilitation support cannot be expensed while also claiming the DTC, Mr. Carson's analysis (and our own analysis) assumes that the DTC will not be claimed once all awards are in place.

In calculating the "base" taxes for the earning ("first dollar") award however, Mr. Carson includes the DTC, resulting in a larger-than-otherwise gross-up. The preferable approach would exclude the DTC from both the first-dollar and the second-dollar stages of the calculation. This decreases Mr. Carson's \$129,500 result by about 12.5%.

[Emphasis in original]

[37] I accept Mr. Szekely's calculations in preference to those of Mr. Carson. His evidence is that the necessary gross-up of the jury's award is \$90,000. The fees of the Public Guardian and Trustee will, on his calculations, amount to \$389,500.

Summary

[38] After the necessary adjustments to the jury's verdict, judgment shall be entered in the following amounts:

- Non-pecuniary damages \$309,300;
- Past loss of Income (after deductions for tax and amount already received as temporary disability benefits) \$46,516;
- Pre-judgment interest \$3,875;
- Future loss of income \$375,000;
- Cost of future care \$1,610,000;
- Fees of the Public Guardian and Trustee \$389,500;
- Tax Gross-up \$90,000.

[39] The parties may set a date on which to make submissions regarding costs.

"W.F. Ehrcke, J."

The Honourable Mr. Justice W.F. Ehrcke

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/06/09/2006bcsc0949.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/li-v-sandhu-2006>

Prepared on 29 October 2026 · Esheria